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No. 1609

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

EDWARD GRABOWSKI,

Petitioner,

vs.

STATE OF KANSAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Edward Grabowski (a/k/a Edward Grabinski) prays that a writ of certiorari be issued to review the decision of the Supreme Court of Kansas affirming his conviction in Douglas County, Kansas, for possession of marijuana, for which offense he was sentenced to a term of 7 years, such being the penalty prescribed in K.S.A. 65-2519(a).

Opinion Below

The opinion of the Supreme Court of Kansas was handed down on January 23, 1971, but is not as yet reported. It is printed in this petition as Appendix A.

Timely petition for rehearing was denied on February 18, 1971. Appendix B.

Jurisdiction of this Court

Jurisdiction of this court is invoked under Title 28, U. S. Code, Sec. 1257(3) and Rule 22(1) of the Rules of this Court.

Question Presented for Review

Is a State conviction for possession of marijuana legal where the State maintained the search of defendant's car (where the marijuana was found) was made with consent of the defendant, where no showing was made that defendant was given any warnings in accordance with the requirements of *Miranda* v. *Arizona,* 384 U.S. 436, and where no showing was made that defendant was aware he could refuse permission to search the car?

Statement of the Case

Deputy sheriff James Woods of Douglas County, Kansas, on a routine patrol in a rural area northeast of Lawrence, Kansas, observed an empty and locked car in a farm parked along a deadend road on October 23, 1969 at about 8:30 p.m. The car had Illinois license tags. He knew the immediate area was one in which marijuana grew. He and another deputy sheriff, one Anderson, staked themselves out in different locations and waited until the car emerged from the field. They stopped the car. Upon request, petitioner produced an Illinois driver's license.

Petitioner asked why he had been stopped and deputy Woods said, "I informed him that it was a routine check of himself and his automobile" (Tr. 14).

Both petitioner and his passenger, one Raymond Sauer also from Chicago, Illinois, were out of the car. It was the testimony of the officer that they asked if they could search the car and the petitioner said they could.

The officer found a plastic bag containing what turned out to be marijuana on the floor of the passenger side under the front seat where Sauer had been sitting.

Raymond Sauer testified that the marijuana was his, and not the defendant's, and that defendant did not know of its presence until they were stopped. Sauer had previously pled guilty to the charge of possession, and was placed on probation. The petitioner denied any knowledge of the presence of the marijuana in the car. His four-year old conviction from Illinois for possession of one marijuana cigarette was introduced during the State's case in chief to show "intent" (Tr. 51-52).

REASON FOR GRANTING THE WRIT

There was no showing in the record that petitioner intentionally waived his Fourth Amendment right to be free from search. No Miranda warnings were given him with respect to his right to refuse to consent to search.

The Kansas Court's opinion set out the problem thusly:

> "The first (contention of defendant) is that his motion to suppress the evidence should have been sustained because it was seized as a result of an illegal search and seizure. It is not denied that he gave permission to search his car, but is argued the record is silent as to whether he was aware of the fact that at the time he could have refused to permit the search and therefore he did not intentionally waive a known right or privilege." (App. A, p. App. 3).

As to this point petitioner in his brief and in his oral argument in the State Court, cited *Schoepflin* v. *United States,* 391 F.2d 390 (9 Cir. 1968) as dispositive of the issue. The Kansas court ignored that case, as well as the others cited in petitioner's brief and in the petition for rehearing. The court merely held:

> "There is nothing in the record even remotely to suggest that his consent was the result of fraud, coercion or duress, or that he lacked sufficient intelligence to appreciate the consequence of such consent. When one knowingly and voluntarily consents to a search of his vehicle by peace officers, he may not later complain that items found in the search are the fruits of an illegal search and seizure — and therefore inadmissible" (Op. App. A, p. App. 4).

The Kansas court has ignored the holdings by this court in *Johnson* v. *Zerbst,* 304 U.S. 458 (1938) at 464 as interpreted by the historic decision in *Miranda* v. *Arizona,* 384 U.S. 436 (1966). "The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently" 384 U.S. 447.

Schoepflin v. *United States, supra,* is identical to facts at bar. Defendants there were convicted of robbing a bank. Co-defendant Smith objected to the receipt into evidence of certain articles seized in his apartment as a result of a police search. This consisted of bundles of currency which were the fruits of the bank robbery and other incriminatory evidence. Police officers went to Smith's room, rang the doorbell and Smith appeared. The officers asked if they could come in and Smith invited them. Once in, the officers asked if they could search the apartment and Smith replied, "Go ahead, I have nothing to hide." 391 F.2d at 398. The money and other incriminatory pieces of evidence were found. The trial court held that Smith had waived his immunity from search by consent. But the Ninth Circuit held that waiver means the "intentional relinquishment or abandonment of a known right or privilege", citing *Johnson* v. *Zerbst,* 304 U.S. 458, 464 and reversed stating, p. 399:

> "There is not a word of testimony in the record to indicate that Smith was aware of the fact that he could refuse to permit the requested search of his apartment."

Compare *United States* v. *Page,* 302 F.2d 81 (9 Cir. 1962) at 82 where officers testified that in requesting permission to search the house of the defendant, they told defendant that "he was not required to consent to a search". But even in *Page,* the trial court suppressed the evidence; however the Court of Appeals reversed for the purpose of having the trial court set out its fact-findings in its opinion.

In *United States* v. *Nikrasch,* 367 F.2d 740 (7 Cir. 1966), the court reversed a conviction based on the "fruit of the poisonous tree" and stated, p. 744:

> "On this appeal the Government has not argued that defendant waived the protection accorded by the

> Fourth Amendment by consenting to the 9:00 A.M. car search at the police station and the subsequent search at the Mancuso Chevrolet agency. Since the arrested defendant was then in custody in the Skokie cell block *and had not been apprised of his Fourth Amendment rights,* the trial court correctly observed that no true consent had been given to Detective Reiter. *Johnson* v. *Zerbst,* 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L.Ed. 1461; *Judd* v. *United States,* 89 U.S. App. D.C. 64, 190 F.2d 649, 651 (1951); *United States* v. *Blalock,* 255 F.Supp. 268 (E.D.Pa., 1966)." (Emphasis added.)

We stress that the search which took place here occurred on August 23, 1969 and the trial took place on January 26, 1970, well after *Miranda* v. *Arizona, supra,* had been decided. (And, incidentally after *Schoepflin* v. *United States, supra,* decided January 2, 1968).

Thus, an important question of the applicability of the *Miranda* principle of the necessity for warnings before a constitutional right may be considered to be waived is at issue. The Kansas Supreme Court has decided the question in a manner in conflict with the *Miranda* decision; and it also deliberately avoided any discussion of the *Schoepflin* case. It is submitted that in view of the Ninth Circuit Court of Appeals decision on this question, that this court announce guidelines in this area for State courts to follow.

Conclusion

For the foregoing reasons the petition for writ of certiorari should be allowed.

Respectfully submitted,

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